IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 2 1969

JOHN F. BURKE,)

Appellant,)

-vs-)

INTERNATIONAL BROTHERHOOD OF)
BOILERMAKERS, IRON SHIPBUILDERS,
BLACKSMITHS, FORGERS AND HELPERS,)
and LOCAL NO. 6 thereof,
)

Appellees.)

NO. 22486

APPELLANT'S CLOSING BRIEF

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I.

JURISDICTION AND ASSIGNMENT OF ERROR

Appellees complain (BR. 1)[1] that we have not indicated the basis of this court's jurisdiction nor (BR. 2) have we set forth a specification of errors. Our brief, however, quite literally followed the Federal Rules of Appellate Procedure, effective July 1, 1968, Rule 28 of which specifies the content of an appellant's brief. Nowhere in the rule is provision made for either a statement of jurisdictional grounds or a specification of errors.

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[1] Appellee's Brief is referred to herein as BR; Appellant's Opening Brief is referred to herein as OP. BR; CT refers to Clerk's Transcript.

Lest appellees be misled, however, let us say that this court's jurisdiction of this appeal rests squarely on the basic underlying appellate statute, 28 U.S.C.A. 1291, which provides

> "§1291. Final decisions of district courts
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . ., except where a direct review may be had in the Supreme Court."

And that the "Specification of Errors" which appellees seek is to be found in the "Statement of Issues to be Presented for Review" (see Rule 28[a][2], F.R.A.P., supra), on pages 1 and 2 of our opening brief:

> "(1) Did the District Court have jurisdiction to review the actions of the defendant unions?
>
> (2) Was plaintiff deprived of the rights of speech and assembly within the unions guaranteed to him by 29 U.S.C.A. 411(a)(1) and (2)?
>
> (3) Was plaintiff denied the safeguards against improper disciplinary action guaranteed to him by 29 U.S.C.A. 411(a)(5)?" (OP. BR. 1:25 - 2:5).

The claimed errors of the District Court obviously are its holding that questions 2 and 3, supra, were to be answered in the negative, rather than in the affirmative (see our Opening Brief, pp. 12, 15).[2]

With this behind us, we turn to the issues on the merits.

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[2] Question 1, supra, we concede, was answered correctly by the District Court in assuming jurisdiction of this case (OP. BR. 11). Apparently appellees agree with us (BR. 6)

II and III

APPELLANT WAS DEPRIVED OF THE RIGHTS GUARANTEED TO HIM BY 29 U.S.C. 411(a)(1) AND (2) AND HE WAS DENIED THE RIGHTS GUARANTEED TO HIM BY 29 U.S.C. 411(a)(5)

In our opening brief we separated the "substantive" aspects of the case (those based on 411[a][1][2]) from the "procedural" ones (those based on 411 [a][5]). They are, however, obviously interrelated and in this reply brief we shall treat them under one heading since the argument flows from one directly into the other.

. . . .

Appellees, citing Salzhandler v. Caputo, 615 F. 2d 442 (2d Cir., 1963),[3] recognize that Section 411(a)(1) and (2) were designed to protect the rights of a union member to discuss freely, and to criticize, the management of the union and the conduct of its officers.

Appellees cannot, and do not, deny that appellant was for a number of years engaged in precisely this kind of protected activity and that this was the critical area of conflict between him and the International Union which eventually expelled him from membership. They claim, however, that because the International Union found a convenient excuse upon which to peg

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[3] As we pointed out in our opening brief, Salzhandler was cited with approval and followed by this court in Boilermakers Union v. Rafferty, 348 F. 2d 307, 311-312 (9 Cir., 1965) -- a case involving this very international union.

its action, this court should blind itself to the realities revealed by the record. These realities are that appellant was an articulate champion of the autonomy of the San Francisco local and of the democratic rights of its members and that it was this conduct on his part which brought him into open, notorious and repeated conflict with the International. Appellees do not, because they cannot, deny that, in the presence of the International President (who later cast his not insignificant weight on the side of appellant's expulsion), the International Vice-President and Executive Board Member who instigated the charges against appellant, who refused to withdraw them at the informal conference and who pressed them vigorously throughout, categorically stated that the case against appellant was really being prosecuted, not because of the removal of the contracts, but because of "an accumulation of events that had transpired." These events, of course, had to do with appellant's opposition to international policy on a variety of internal union questions: should the books be open or closed; should the local or the international determine who got higher paying jobs; should a credit union be permitted to operate in the local union hall; should the local subscribe to a labor newspaper for its members; should the local be placed under an international trusteeship?

In asserting and advocating his position on each of these issues, appellant was plainly exercising rights guaranteed to, and protected for, him by Section 411(a)(1) and (2) of the Act.

That he was in truth and fact punished because of the "accumulation of [these] events" is crystal clear from the record. That is what the trial was all about.

A competent observer of these matters has noted that bias may take the form of

> "deliberately using discipline as a device to eliminate disliked members" (Summers, LEGAL LIMITATIONS ON UNION DISCIPLINE, 64 Harvard Law Review 1049, 1082).

And it has been held that a member may not be punished on the basis of a charge which is merely a pretext to eliminate him because he was critical of the union's officers or policies (Leonard v. M.I.T. Employees' Union, 225 F. Supp. 937 [DC, Mass., 1964]) -- a case mentioned in our opening brief and not even adverted to by appellees.

When the record is read in its entirety, it is clear that this is precisely what happened here. Thus, not only is there the concession of Vice President Precht noted above that the case was being prosecuted because of "an accumulation of evidence" relating to appellant's anti-International activity, but there is also the unwarranted assumption of jurisdiction by the international union after the local people indicated they had no disposition to act against appellant; there is the fact that the informal hearing was not utilized in any way by the International President to resolve the issue; there is the fact that the International President had already previously set the formal hearing for the very following day (anticipating

no doubt that the informal hearing would be aborted); there is the fact that the Trial Panel was impotent to rule on the International President's assumption of jurisdiction; there is the fact that neither the Trial Panel, the Executive Board nor the International President paid the slightest attention to the uncontradicted evidence that appellant was admittedly motivated by a desire to best represent the membership of Local Lodge No. 6; there is the fact that the International President forwarded the recommendation for the ultimate penalty with his "full concurrence"; there is the fact that any vote by a member of the Executive Board for a lesser penalty would have to be "fully explained"; there is the fact that several members of the Executive Board were in financial debt to the International. Finally, and perhaps most importantly, there is the fact, as the District Court itself found, that, taken all in all, this record is "barren of one shred of evidence" that what appellant did was "detrimental to the best interests of appellees." (See CT 492.) Yet, despite this fact and in the face of all the procedural violations heretofore enumerated, the maximum possible penalty -- expulsion -- was imposed upon appellant.

If the Bill of Rights for union members is to have any substantive meaning (411[a][1] and [2]) or if it is to require that minimum procedural guarantees are to be followed to protect union membership (411[a][1][5]), then, on this record, appellant's expulsion cannot stand.

The courts have not hesitated to enforce these provisions of the law in this regard. In addition to the cases cited in our opening brief, attention is called to Vars v. International Brotherhood of Boilermakers, 215 F. Supp. 943 (DC. Conn., 1963), in which the court set aside an expulsion order imposed by this same International upon one of its members, and stated:

> ". . .in determining whether a full and fair hearing had been granted, it is within the province of the Court to satisfy itself that the findings and conclusions of the presiding trial hearing officer, as ratified and adopted by the Executive Council, are sufficient as a matter of law to sustain a finding of guilt. Where the record clearly indicates that the rule of law upon which conclusions were reached was in error, then such findings and conclusions should be set aside." (at 949)

In affirming the District Court in the Vars case, the Court of Appeals said:

> "If Section 101(5) is to provide any measure of protection for the individual union member who finds himself beseiged by the full power of the International Union, some review is necessary in order to protect such members from obvious abuses. This is especially true in cases such as this where the hearing examiner is not an independent figure divorced from union controversies but is an officer of the International Union. Thus, although the courts may be without power to review matters of credibility or of strict weight of the evidence, a close reading of the record is justified to insure that the findings are not without any foundation in the evidence." (Vars v. International Brotherhood of Boilermakers, etc., 320 F. 2d 576, 578 [2 Cir., 1963]; underlining supplied).

Applying the foregoing principles to the record in this case, it is clear that the judgment of the court below

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CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

DATED: January 31, 1969.

Respectfully submitted,

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT

By ______________________
Richard Gladstein

____
Norman Leonard
Attorneys for Appellant

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[4] This is particularly true where, as here, the imposition of the extreme penalty is clearly unreasonable under all the circumstances and is unjust to the individual member. Compare Parks v. International Brotherhood of Electrical Workers, 203 F. Supp. 288, 311 (DC, Md., 1962).